No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

CYNTHIA L. ESTLUND
SAMUEL ISSACHAROFF
727 East Dean Keeton Street
Austin, Texas 78705
(512) 471-0347

TERRY L. WELDON
Counsel of Record
98 San Jacinto Boulevard
1260 San Jacinto Center
Austin, Texas 78701
(512) 477-2256

Attorneys for Petitioners

144130

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTION PRESENTED

What is the proper standard of liability of a school district under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994), for a teacher's sexual harassment of a pupil?

LIST OF PARTIES

The Petitioners are Alida Star Gebser and her mother, Alida Jean McCullough.[1] Respondent is Lago Vista Independent School District.

1. This suit was filed when Alida Gebser was a minor. The pseudonyms "Jane Doe" and "Jean Doe" were used to designate her and her mother, Alida Jean McCullough, who sued as her next friend. Alida Gebser having become an adult, the Petitioners have chosen to use their legal names.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

OPINIONS BELOW

The opinion of the court of appeals, Petition Appendix [hereinafter "Pet. App."] 11a-16a, is reported at 106 F.3d 1223 (5th Cir. 1997). The opinion of the district court, Pet. App. 1a-10a, is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals, Pet. App. 17a-18a, was entered on February 24, 1997. The petition for a writ of certiorari was filed on May 23, 1997, and was granted on December 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . .

STATEMENT OF FACTS

This case concerns the liability of a school district for the sexual exploitation of Alida Star Gebser, one of its students, by a male teacher. The record reveals that Frank Waldrop, the student's teacher and trusted mentor, targeted Gebser with an escalating campaign of sexual predation, beginning with special attention and sexual innuendo in the classroom and culminating in unlawful acts of sexual intercourse when she was fourteen years of age. Waldrop capitalized upon his professional position as a teacher,

and the authority that Respondent granted to him, to prey on Gebser's vulnerabilities. Respondent, having put Waldrop in this position of authority, failed to take any measures to prevent sexual harassment, failed to provide Gebser with any information designed to help her recognize such harassment, and failed to provide her with any procedure by which she could notify anyone of the harassment. Initially flattered by her teacher's attentions, unable to recognize the inappropriateness of his behavior until it was too late, unaware of any person to whom she could turn for help, and convinced by Waldrop to keep his actions a secret, Gebser submitted to Waldrop in order to retain her position as his student. At issue is whether the school district's lack of actual knowledge of its teacher's misconduct insulates it from liability under Title IX.[2]

The district court granted summary judgment in favor of Respondent, and the Fifth Circuit affirmed. The Fifth Circuit held that a school district could not be liable for its teacher's sexual discrimination against students *unless* an administrator with supervisory powers over the offending teacher gains actual knowledge of the misconduct *and* the supervisor then fails to take prompt and effective remedial action. These are the facts of record:

In middle school Gebser was placed in a gifted and talented program taught by Trudy Waldrop, the wife of Frank Waldrop. Because of Gebser's precocity, Mrs. Waldrop and her husband arranged for Gebser to attend a great books discussion group at the high school, led by Mr. Waldrop. Joint Appendix [hereinafter, J.A.] 51a. At that time, Gebser was thirteen years old. Frank Waldrop was a mature man who had taken up teaching after retiring from the military. J.A. 81a. In her freshman year of high school, when she was fourteen, this contact between Gebser and Waldrop became a formal student-teacher relationship. Waldrop began singling

2. The teacher, who is not a party in this action, was employed by Respondent, a public school district in Texas that receives federal funding, J.A. 69a.

Gebser out for special attention because, she thought, of her intellectual qualities. J.A. 53a.

Waldrop initiated his approach to Gebser by making suggestive remarks to her in the presence of other students. The remarks seemed in retrospect calculated to flatter her for understanding them while introducing a covert sexuality into their teacher-student relationship. On one occasion during class discussion, for example, he made a reference to "Tantra," believing that Gebser alone would understand that "Tantra" was "sex magic." J.A. 53a. Throughout this period, Waldrop continued what amounted to a covert flirtation with Gebser by making suggestive but ambiguous remarks in the classroom. At this time, however, Gebser did not recognize anything inappropriate in Waldrop's behavior. J.A. 53a.

Such remarks continued through Gebser's freshman year. J.A. 53a. But events took a sudden turn with an event just before spring break of her freshman year, 1992. J.A. 55a. Waldrop came to Gebser's home, when she was alone there, to deliver a book that she needed for a school project. J.A. 53a. While they were alone there together, Waldrop flattered Gebser on her maturity and then took the opportunity to embrace and kiss her and to fondle her breasts and genitals. J.A. 54a-55a. As Gebser testified:

> [T]hat incident was, at the time, the first absolutely blatant, no questions, no mistaking, sexual advance that he had made towards me. The other things had all been double entendre and, quote, references, things like that. You know, the sort of thing that if you knew the references that he was making, you would understand, but if you didn't, it would seem innocent.
>
> I was terrified. I had no idea what I was supposed to do. I had trusted him. I had believed him. I — you know, he was basically my mentor. And it was

> terrifying. He was the main teacher at the school with whom I had discussions, and I didn't know what to do.

J.A. 56a. A sexual relationship between the two, including repeated acts of sexual intercourse, began a short time later. J.A. 59a-60a.

The following Summer of 1992, by which time Gebser had turned fifteen years of age, Waldrop arranged to teach an Advanced Placement (AP) class for which Gebser hoped to receive college credit. J.A. 60a. It was the only AP class taught in her school that summer, and Gebser's only opportunity to obtain college level credit. *Id.* Although one or two other students signed up for that class, after the first meeting only Gebser attended, leaving her alone with Waldrop throughout this period. During that summer Waldrop had sexual relations with Gebser regularly. J.A. 60a.

> [B]asically, he would pick me up from my house about once a week with the — made comments about studying psychology, and would say it in such a way that it, to me and him, it was obviously just a different way of saying having sex.

Id.

After the fall semester began, Gebser was again assigned to Waldrop's classes. Gebser testified that Respondent had all but terminated the Gifted and Talented program at Lago Vista High School. J.A. 61a. Gebser's only means of getting the educational programs she needed depended on the good graces of Waldrop; it was Waldrop alone who offered her advanced classes in sociology and psychology, and the record clearly indicates that he used his official position as Gebser's teacher to propose sexual interludes:

> [H]e would — either as I was leaving the class or as I was passing by in the hallway or things like that,

> he would sort of draw me aside and ask if my schedule worked out to study psychology that day, or something like that. And I basically just went along with what he said.

J.A. 60a-61a.

This pattern of sexual contact continued until they were apprehended by a law enforcement officer who happened upon them while they were engaged in sexual activity. J.A. 83a.

Gebser testified that she knew Waldrop's sexual contact with her was wrong. J.A. 55a-56a. She explained her reaction to him by saying that she had trusted him as a mentor and the teacher she worked with most closely in the school. J.A. 63a. This attitude persisted even though, after he initiated sexual relations with her, Waldrop encouraged her to have sex with a boy near her age, because "it would be sort of suspicious if I didn't have some other relationship that the world could know about." J.A. 67a.

Gebser testified that she talked to one or two of her friends about her situation in a general way, without identifying Waldrop by name. J.A. 58a. But she did not report Waldrop's preliminary advances either to her family or to any school officials or teachers. Waldrop, not surprisingly, used his influence over Gebser to persuade her to keep his actions secret. J.A. 64a. She did not inform her family because "I was terrified." J.A. 56a. She did not complain to any school official or teacher in part because she knew that if she informed anyone of his behavior, "then I wouldn't be able to have this person as a teacher anymore and that was my main interest in any relationship with him." J.A. 62a. This would have included the advanced courses taught by Waldrop and the college level course offered only by Waldrop as well as the Gifted and Talented courses. J.A. 60a-61a. Moreover, Gebser explained,

> Mr. Waldrop was the person in the Lago administration, I guess, if you want to call it, who I most trusted, and he was the one that I would have been making the complaint against. I — I didn't know what I was supposed to do.

J.A. 63a.

Gebser "didn't know what to do" because the school district did nothing to inform her or other students about how to respond to sexual harassment or other discrimination. Although Respondent claims to have formally adopted an anti-discrimination policy, J.A. 43a-50a, that policy was never communicated to the students. Virginia Collier, the school superintendent during the relevant period, appointed herself as the nominal Title IX coordinator, and was responsible for school district efforts to prevent sexual discrimination. J.A. 69a. Yet Collier admitted that no specific person was appointed by the district to receive complaints of inappropriate sexual conduct or harassment, as required by Department of Education regulations. Instead, Collier said that the principals of each school would have received such complaints. J.A. 71a-72a. Again, there is no indication that this was ever communicated to the students in any fashion, as is also required by Department of Education regulations in place well before the events in question. Nor could Collier point to any steps taken by the school board, such as district-wide meetings or counseling of the faculty, to prevent or discourage sexual contact between faculty and students, until after the relationship between Waldrop and Gebser had been discovered. J.A. 70a-71a.

Just as Respondent failed to educate its faculty about the risks of sexual discrimination and the official policy prohibiting it, Respondent also failed to communicate any information to the students that would have helped them recognize sexual

discrimination and sexually harassing behavior. Gebser, despite her precocity, was completely naive on this subject, and testified that her "only exposure to anything like that . . . was . . . references on TV and stuff about female students marrying their professors. I had no idea that that stuff actually happened." J.A. 57a. There were simply no procedures in place to prevent or even discourage harassment by teachers, no effort to notify the students of what to do in the event harassment occurred, and no procedures to allow them to report it.

The importance of early intervention is illustrated by another set of inappropriate sexual approaches by Waldrop to three other schoolgirls. Despite the lack of formal complaint procedures, the parents and guardians of these three girls did complain about remarks Waldrop made in the presence of the girls. Those remarks were strikingly similar to those employed by Waldrop in the early stage of his approach to Gebser. On each occasion, Waldrop's initial strategy was to make ambiguously suggestive remarks that were easily denied if challenged.[3] In these instances, Waldrop reportedly made specific references to a girl's figure, and made a suggestive remark in the presence of another concerning a male student's anatomy. J.A. 87a-90a. In addition, one of the girls told her mother "that whenever Mr. Waldrop looked at her, she felt like he was looking at her up and down." J.A. 89a. Another said that, in a Gifted and Talented class attended only by her and Gebser,

> most of the time was spent in conversation. And that much of that was strange and uncomfortable to the point of having sexual connotations as well as telling off-colored jokes and stories that Mr. Waldrop

---

3. Waldrop's pattern of using double-entendres as a means to illicitly sexualize the teacher-student relationship, while maintaining deniability should the teacher be caught, is not unique. *See Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1016-17 (7th Cir. 1997).

> found very amusing, but that made [the girl] feel very uncomfortable.

J.A. 90a.

The girls' parents and guardians complained directly to the high school principal, Martin Riggs, describing the girls' complaints in detail. J.A. 92a. Riggs arranged a meeting between the parents and guardians and Waldrop, at which Waldrop denied making any suggestive remarks. J.A. 91a-93a. Riggs accepted Waldrop's denial of the incidents and of any bad intentions and left the matter at that. J.A. 92a-93a.

Riggs conducted no investigation beyond meeting with Waldrop and Mr. and Mrs. Tully. Because Gebser was the only other student in the class in which some of the comments were made, J.A. 90a, it is at least possible that an investigation might have revealed his then ongoing conduct with Gebser. Nor did Riggs make any written notes of the meeting between Waldrop and the Tully family, or make any entry in Waldrop's personnel file about the accusations against him. J.A. 81a-82a. Principal Riggs also failed to report the incident to Superintendent Collier, until after the sexual contact between Waldrop and Gebser was discovered. J.A. 82a-83a. Collier agreed that the incident should have been reported to her, J.A. 74a-75a, though there was no established procedure for doing so.

Even though Riggs failed to investigate the complaints about Waldrop, and passively accepted his denials, the complaints by the Tully family appear to have curtailed Waldrop's inappropriate conduct with respect to their daughters. Gebser, however, lacked the experience to recognize Waldrop's behavior as sexually harassing and discriminatory until it was too late. Once she was seduced into a sexual relationship with Waldrop, she testified that she was terrified, J.A. 57a, ashamed and depressed, J.A. 65a, and "freaked out." J.A. 65a.

Gebser testified that she "wanted to have somebody to help me figure out what I should do." J.A. 58a.

> If I had known at the beginning what I was supposed to do when teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified and I had no idea where to go from where I was.

J.A. 64a.

Because the school district failed to provide her with basic information that would have helped her to identify the harassment for what it was, and because the school district failed to tell her of any complaint procedure, she told no one. Instead of finding a remedy within the school system, Gebser, in clear child-like fashion, sought an avenue of escape that would avoid the situation: her solution was to try to graduate early from high school as "a way that without being discovered, without bringing it to light, that I could get out of it without having his disapproval." J.A. 64a.

STATEMENT OF THE CASE

Petitioners originally filed this suit against Waldrop in state court alleging violation of state tort law. Subsequently, Petitioners amended their suit to join Respondent as a defendant, alleging violations of Gebser's rights under the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1994), and under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a) [hereinafter "Title IX"]. Subsequently, on Respondent's motion, the case was removed to Federal district court.

Shortly before the case was to be called for trial, the United States District Court for the Western District of Texas granted

Respondent's Motion for Summary Judgment with a memorandum opinion. Pet. App. 1a-10a. Regarding Title IX, the court held that the school district could not be liable absent a showing of actual or constructive notice of the discriminatory conduct and that, as a matter of law, there was no summary judgment evidence of either actual or constructive notice.

Because no federal question had been alleged against Waldrop, on Petitioners' motion the complaint against him was remanded to state court, resulting in a final judgment in the action against the school district. J.A. 39a-42a. That judgment was appealed to the Court of Appeals for the Fifth Circuit. A three-judge panel unanimously affirmed the lower court's judgment, and issued its opinion. Pet. App. 11a-16a. That court held that a school district could never be liable for sexual harassment of students by teachers unless an official with supervisory power over the offending employee had actual knowledge of the misconduct and failed to take remedial action.

SUMMARY OF THE ARGUMENT

Preventing the sexual abuse of young girls by male teachers is at the very heart of Title IX's statutory guarantee against discrimination on the basis of sex. As the Court affirmed in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), sexual harassment is a potent form of discrimination on the basis of sex in the educational context, just as it is in the employment context. Moreover, in both contexts, one of the most severe forms of sexual harassment occurs when those who have been granted power and authority over others — teachers over students and supervisors over employees — use that power to extract sexual gratification. Sexual abuse of this sort invariably is conducted by an individual agent, and almost invariably in secret. The question that arises in both contexts, and that is raised by this case, is the liability of the school or employer that empowered the offending agent for the resulting harm.

In the employment setting, in which the affected employees are adults and there is no *in loco parentis* obligation, the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), did not permit an employer that had no adequate procedures to receive complaints of harassment to rely on its lack of knowledge of harassment by its agents as a defense. The question before the Court in this case is whether a less demanding standard of care should apply when the bearer of the supervisory power is a teacher rather than a workforce supervisor and when the victim is not an adult but a child as to whom the school district exercises *in loco parentis* obligations.

The comparison to Title VII and to the question of employer liability for harassment that has arisen under that statute is crucial. We maintain that both the text of Title IX, which requires that persons "shall not be subject to discrimination under [federally funded] programs," and the distinct context in which it operates, particularly at the elementary and secondary level, call for a higher level of institutional responsibility for sex discrimination and sexual harassment under educational programs than Title VII calls for on the part of employers.

We then proceed to examine three standards of school district liability, the first of which — actual notice — should be decisively rejected as inconsistent with Title IX. By requiring proof of actual knowledge by a school district official of a teacher's misconduct, the Fifth Circuit holds school boards to a lower standard of procedural care than is currently the law for employers. Not only does an actual notice standard misconstrue the text of Title IX, but it provides no incentive for school boards to establish and publicize procedures by which students may readily complain of improper conduct before it escalates to the damaging level seen in this case. On the contrary, the rational response of a school district to the actual notice standard is assiduously to avoid receiving complaints and thereby become aware of sexual misconduct by its agents. By

discouraging schools from adequately protecting children from sexual predation, the Fifth Circuit standard undermines the core statutory purposes of Title IX and must be rejected.

Petitioners propose two alternative standards of school district liability for cases of abuse under Title IX. A plaintiff in a Title IX harassment case should be able to prevail under either standard.

First, we urge the Court to impose a modified constructive notice standard like that followed by a number of courts under Title VII: School districts should be liable for sexual harassment of which they knew or should have known, *or for which they afforded no reasonable avenue for complaint and redress*. No school board should be able to rely on lack of constructive or actual notice as a defense to liability for sexual harassment under its programs *unless* it had promulgated and publicized adequate procedures — adequate in light of the age and maturity of the students they are designed to protect — to uncover and stop inappropriate teacher behavior as soon as possible. The establishment and publication of such procedures was *required* by Department of Education regulations for recipients of federal funds well before the events at issue here. In the absence of such adequate and required procedures, the school district should be liable for harassment and other forms of intentional sex discrimination, at least by its own agents.

Second, we contend that the distinct language and purpose of Title IX, and the unique context in which it operates, calls for vicarious liability for intentional discrimination, such as harassment, that is carried out by teachers or others who are aided in doing so by their authority over the student victim. Such vicarious liability is consistent with traditional common law agency principles under which a principal is responsible for the harms committed by its agent where the commission of such harms is facilitated by the powers entrusted to the agent. The proposed liability standard is also consistent with guidelines issued by the Department of

Education. Such vicarious liability would provide a strong incentive for school districts vigilantly to police sexual misconduct by their agents and to create effective complaint and investigative procedures, and is most consistent with the responsibility of school districts under Title IX to insure that students are not "subject to discrimination" under educational programs.

Under either standard, the Fifth Circuit's inflexible and irrational requirement of actual knowledge must be rejected. An ignorance-is-salvation approach is inconsistent with the duty owed schoolchildren under Title IX.

ARGUMENT

I.

THE TEXT AND CONTEXT OF TITLE IX, AS COMPARED TO TITLE VII, CALL FOR BROADER SCHOOL DISTRICT RESPONSIBILITY FOR DISCRIMINATION UNDER ITS PROGRAMS, AND PARTICULARLY BY TEACHERS AND OTHERS WHO EXERCISE AUTHORITY OVER STUDENTS IN THOSE PROGRAMS.

Title IX requires that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994). In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court recognized that a teacher's sexual harassment, and in particular sexual abuse, of a young student constitutes a form of discrimination under Title IX for which damages are available:

> Unquestionably, Title IX placed on the Gwinnett County Public School the duty not to discriminate

> on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75.

At issue in *Franklin* was whether a private right of action for money damages would lie under Title IX.[4] In deciding that question, the Court did not decide the standard under which school boards should be held liable for the misconduct of their subordinates. At the same time, the Court suggested that intentional discrimination in the form of sexual harassment by teachers did constitute an actionable violation of a school district's obligations under Title IX.[5] We contend that this suggestion reflects a proper understanding of school district liability under Title IX, and should be adopted as the law.

Franklin also introduced the analogy to sexual harassment under Title VII and the parallel between supervisor harassment of employees and teacher harassment of students. Employers empower supervisors to control many terms and conditions of employment for employees: supervisors exercise much of the

4. The Court had previously recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX is enforceable through an implied private right of action.

5. In *Franklin* itself, there was ample evidence that school officials knew of the teacher's abuse and discouraged the victim from filing a complaint against him. 503 U.S. at 63-64.

employer's power to hire, fire, demote, and discipline employees and to set their conditions of employment. Similarly, school districts empower teachers not only to instruct students, but also to assign grades, to impose discipline, to control much of their behavior, and generally to manage the school environment. Sexual harassment by supervisors, like sexual harassment of students by teachers, constitutes intentional discrimination on the basis of sex by imposing severely disparate conditions of employment or education. *See Franklin*, 503 U.S. at 74-75.

This analogy has led most courts of appeal under Title IX to adopt standards of liability based on Title VII caselaw, and to adopt in turn the agency principles to which the Court directed courts in *Meritor*. *See Krakunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988). Other courts, including the Fifth Circuit, have found critical differences between Title IX and Title VII that have led them to the far more restrictive "actual notice" standard of liability. *See Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648, 650 (5th Cir. 1997).

While there are critical differences between Title VII and Title IX, as well as between the school context and the workplace, those differences call, if anything, for a broader standard of liability under Title IX.

A. The language of Title IX, as compared to the language of Title VII, supports broader responsibility of school districts for intentional discrimination by teachers against elementary and secondary students.

Title VII makes it unlawful "for an employer . . . to discriminate against any individual with respect to his . . . conditions . . . of

employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1) (1994). Only discrimination by the "employer" violates Title VII. But the statute defines "employer" to include any "agent" of the employer. 42 U.S.C. § 2000e(b) (1994). The Court in *Meritor* relied upon the statutory language of Title VII, and particularly the reference to "agents," to limit the scope of employer liability for discriminatory acts of employees:

> Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable.

Meritor, 477 U.S. at 72 (citations omitted). The Court concluded that Congress intended rather to refer to agency principles to determine when the employer would be liable for the acts of its agents and when it should not be. *Id.*

But Title IX is not phrased as a prohibition on specific misconduct by the school district and its agents.[6] The text of Title IX creates an affirmative duty on the part of recipients of federal funds to insure a school environment free of discrimination. Thus, Title IX provides that "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any educational program or activity receiving Federal financial assistance." Title IX does not contain the language on which the Court in *Meritor* relied in

6. The majority in *Smith* neglected this difference, and read Title IX as if it provided, along the lines of Title VII, that "no federally funded educational program or activity shall discriminate against any individual on the basis of sex." *See* 128 F.3d at 1023 ("Title IX prohibits recipients of federal funds for a 'program or activity' from discriminating on the basis of sex, while Title VII prohibits employers from discriminating on the basis of sex."); *id.* at 1027 (Under Title IX, the " 'program or activity' [must] 'cause' the discrimination.").

rejecting a broad imputation of vicarious employer liability for discrimination by any supervisor and other employees. Instead, Title IX reads as a guarantee by the funded entity against discrimination in its educational programs.[7]

Those courts that have adopted an actual notice standard based on the differences between Title VII and Title IX have misunderstood the import of those textual differences. They have focussed exclusively on the lack of "agent" language in Title IX while ignoring the difference in the basic provision. Thus, in justifying its actual notice standard, the Fifth Circuit relied chiefly on the statute's identification of the "educational program or activity" as the responsible entity and its failure to define "program or activity" to include "agents" along the lines of Title VII. *Rosa H.*, 106 F.3d at 654. According to the Fifth Circuit, the omission of any reference to "agents" means that there is no basis for attributing to school districts the acts of individual agents. *Id.* But the court misreads the statute. Title IX does indeed make funded educational programs (here, school districts), and not their individual agents, *responsible* for Title IX violations. But what are they responsible for? Title IX does *not* parallel Title VII in prohibiting school districts from themselves discriminating or "causing" discrimination; it commands that "no person . . . shall, on the basis of sex, be . . . subjected to discrimination under any [federally funded] educational program or activity."[8]

7. The Court has declared that Title IX should be given "a sweep as broad as its language," *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

8. A majority of a Seventh Circuit panel makes the same mistake in concluding that the absence of any reference to "agents" of the educational institutions means that only intentional discrimination by the institution itself is actionable under Title IX. *Smith v. Metro. Sch. Dist.*, 128 F.3d at 1022-1034. First, the majority ignored the (Cont'd)

We do not contend that Title IX necessarily imposes liability for every discriminatory act by every school employee or student.[9] The question remains, what is discrimination "under any educational program"? The answer cannot be that only discrimination *by* the educational program violates the statute; educational programs, and school districts, act only through individuals, particularly in the realm of harassment. But we concede that the answer cannot be that all discrimination by anyone associated with the educational program, including students, violates the school district's duty and gives rise to liability under the statute. There is thus a need for some limiting principles.

We will propose two such limiting principles, one drawn chiefly from the procedural requirements of the statutory scheme

---

(Cont'd)
fact that the *Meritor* Court looked to agency principles as a justification for *limiting* vicarious liability. *See Meritor*, 477 U.S. at 72. Second, and more importantly, the majority erroneously read Title IX as if it provided, along the lines of Title VII, that "no federally funded educational program or activity shall discriminate against any individual on the basis of sex." *See Smith*, 128 F.3d at 1023 ("Title IX prohibits recipients of federal funds for a 'program or activity' from discriminating on the basis of sex, while Title VII prohibits employers from discriminating on the basis of sex."); *id.* at 1027 (Under Title IX, the " 'program or activity' [must] 'cause' the discrimination."). We maintain, as did the dissenting judge in *Smith*, that the very different formulation of Title IX asks simply whether there was discrimination "under" (not "by") the educational program. *See id.* at 1047 (Rovner, J., dissenting).

9. Thus, for example, in *Mary M. v. North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997), the perpetrator of the harassment was a 21-year-old cafeteria worker and the victim was a 13-year-old student over whom he had no authority. The conduct in that case, unlike in this case, could not be said to have arisen "under any educational program or activity" absent further inquiry into the knowledge and actions or inaction of the school district.

and one from agency law. But the appropriateness of these principles must be gauged by the distinct language and purposes of Title IX, given the context in which it operates. At least in the case of intentional discrimination by a teacher or administrator who carries out the "educational program or activity," and who exercises authority over his student victim under that program, the statutory text strongly supports the proposition that such conduct violates the obligations of the funded entity — here, the school district — under Title IX.[10]

B. Distinct features of the primary and secondary school context, not present in the workplace, support broader school district responsibility for teachers' sexual harassment of minor schoolchildren.

The more encompassing responsibility to prevent discrimination than is called for by the language of Title IX is

---

10. Contrary to the conclusions of the Fifth and Seventh Circuits, the Spending Clause basis of Title IX poses no barrier to damages. U.S.C.A. Const., Art. 1 § 8 cl. 1. It is true that damages may not be recoverable against funded entities under Spending Clause legislation for unintentional discrimination. *Franklin*, 503 U.S at 74-75. *See also Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 599-600 (1983); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981). From this the Fifth and Seventh Circuits concluded that only intentional discrimination by the funded institution itself (*i.e.*, the failure to act once having actual notice of misconduct) was actionable. *See Rosa H.*, 106 F.3d at 652-53; *Smith*, 128 F.3d. at 1028-33. But the Court in *Franklin* disposed of this very argument in the passage excerpted above, by determining that sexual harassment by a teacher, when attributable to the school district, fulfills the Spending Clause requirement of intentional discrimination and justifies the imposition of damages. 503 U.S. at 74-75. Although the facts in *Franklin* left no doubt of the school district's knowledge of its teacher's misconduct, the Court made no reference to those facts in its analysis of the Spending Clause objection to damages. *Id.* There is simply no reason to believe that this evidence was relevant on the Spending Clause issue.

fully consistent with the more encompassing responsibility and authority that school districts have over primary and secondary school students.[11] In the school environment, the teacher's power is in some ways directly comparable to the supervisor's economic power over a worker. In other ways, however, the teacher's power and the student's vulnerability is far greater than the power of the supervisor and the vulnerability of the employee.

1. First, teachers are invariably older than students, often much older, as in this case. Schoolchildren are typically minors, as to whom the law universally recognizes a limited capacity for judgment, particularly in the context of sexual activity.[12] The teacher's greater age and experience will often allow him to

11. The context of higher education, in which students are typically adults who are presumptively capable as a general matter of consenting to sexual activity and of making decisions for themselves, may raise somewhat different issues than are raised by this case. The higher education context may in fact be more analogous to the workplace than is the context of compulsory primary and secondary education.

12. In Texas, for example, the criminal offense of "Indecency with a Child" is defined as sexual conduct with a child younger than 17 years old, regardless of consent. TEX. PENAL CODE ANN. § 21.1 (West 1994). In referring to state law on this issue, we do not of course imply that the contours of Title IX should vary from state to state; we simply illustrate the general recognition in the law that young teenagers are universally held to be vulnerable to exploitation and to require protection against sexual activity. Unlike the adult employee in the Title VII context, minor schoolchildren are deemed as a matter of law to be incapable of consenting to sex with an adult. Thus, the Seventh Circuit recently held that, in the case of a 13-year old victim, the question of whether sexual contact was "welcome" was legally irrelevant because of her age, and that evidence on that issue was so prejudicial as to require retrial. *Mary M. v. North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997).

manipulate the much younger and immature student entrusted to his tutelage.

2. The vulnerability of young students to manipulation by adults is of particular concern because of the devastating psychological consequences that can flow from sexual abuse at an early age, particularly when it is perpetrated by a trusted and important adult in the child's life.[13]

3. The power of teachers and the vulnerability of students is heightened by the compulsory nature of primary and secondary education. School attendance is compulsory for most of this period. The vast majority of students, especially in the public school system, typically have no choice about the school to which they are assigned and little choice in the teachers to whom they must report. The Court's sexual harassment jurisprudence properly rejects the notion that workplace harassment must be tolerated because employees can escape a hostile environment by changing jobs. But where switching schools, or even switching teachers, is often not even a theoretical possibility, the potential for sexual exploitation is even

13. This point was underscored in a different context in the Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), which concerned the far more innocuous act of a high school boy in giving a lewd campaign speech at a school assembly:

> The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students — indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.

Id. at 683.

greater, and the obligation of school districts to prevent such exploitation should be correspondingly greater.

4. All of these factors converge in the notion that "for many purposes 'school authorities ac[t] *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.' " *Veronia School District 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).[14] In several contexts, the Court has recognized the expansive power and responsibility that attends the *in loco parentis* role of local school districts, including the constriction of constitutional rights that might be claimed by adult citizens against the state, but not by schoolchildren against school officials. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (noting that "a proper educational environment requires close supervision of schoolchildren").

There are numerous examples in the Court's earlier school cases that establish both the dependence of schoolchildren and the correspondingly greater authority and duty of school officials. For example, schools have the power, notwithstanding the First Amendment, to remove books from the school library that are deemed vulgar, *Board of Education v. Pico*, 457 U.S. 853, 871-72 (1982), to punish lewd speech by a high school student in a school assembly, *Fraser*, 478 U.S. at 685, and to censor a high school student newspaper in order to shield young students from inappropriate or disturbing material, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Similarly, school officials have broader powers under the Fourth Amendment to search

14. We recognize that the *in loco parentis* concept is outdated to the extent that it locates the exclusive source of schools' power in the students' parents. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). But as the cases cited in text show, the concept remains powerful with respect to the power and responsibility of schools to protect and guide students toward maturity and full citizenship.

students' lockers, *T.L.O.*, 469 U.S. at 339, and to test for drugs, *Acton*, 515 U.S. at 665.

While these cases concern the limited constitutional rights of schoolchildren, the reason for those limited rights lies in the correspondingly greater duties that attach to those exercising *in loco parentis* power over dependent minors. As the Court explained in *Fraser*,

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

478 U.S. at 683.

With Title IX, Congress imposed on school districts a statutory obligation, as a condition of receiving federal funding, to protect students under their care and tutelage from sex discrimination, including sexual harassment. The school district's broad responsibility for the conduct of those individuals who carry out the educational programs, and particularly for the conduct of the teacher "role models" to whom the schools commit the care and guidance of their young students, is entirely appropriate. It is justified by the psychological and physical immaturity of minor

students, the potential for psychological manipulation and serious harm at the hands of older, trusted teachers, the compulsory nature of public and secondary education, and the traditionally heightened *in loco parentis* obligations of the schools.

All of these facts are present in this case: the psychological vulnerability of Gebser, the dependence on an adult role model as mentor, the manipulative process of seduction, the capacity of Waldrop to act as gatekeeper to desired educational benefits, and the immaturity that prevented Gebser from knowing how to extricate herself from an abusive situation. These facts fully bear out the uniquely dependent circumstances of schoolchildren. As the Court described in *Franklin*, it is the exploitation of that vulnerability of schoolchildren that stands foursquare within what Congress "sought by statute to proscribe." 503 U.S. at 75.

II.

THE FIFTH CIRCUIT'S ACTUAL NOTICE STANDARD OF LIABILITY, WHICH PARALLELS THAT REJECTED UNDER TITLE VII IN *MERITOR*, SHOULD BE REJECTED AS WELL UNDER TITLE IX.

The "actual notice" standard of the Fifth Circuit derives from a misunderstanding of the statutory language of Title IX as compared to Title VII.[15] Moreover, in light of differences between the workplace and the school, it makes even less sense as a functional matter under Title IX than it did under Title VII. The Court's rejection of an actual notice standard in *Meritor* thus provides further basis for rejecting that standard here.

---

15. A secondary basis for the Fifth Circuit's adoption of an actual notice standard, and its rejection of any form of imputed or vicarious liability, lies in its analysis of requirements under the Spending Clause. As we explained above, this conclusion is contrary to *Franklin*'s holding on this very issue. *See supra* n.10; *see also infra* n.21.

Meritor involved an employer with no direct knowledge of unwelcome sexual relations between a supervisor and an employee. The employer protested that it could not be held liable without actual knowledge of the objectionable conduct. Although the Court refrained in *Meritor* from issuing "a definitive rule on employer liability," 477 U.S. at 72, it rejected a defense of lack of actual knowledge in the absence of adequate procedures:

> Petitioner's contention that respondent's failure [to use the grievance procedure and put the employer on actual notice of the harassment] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

477 U.S. at 73.

The Court's rejection of an actual notice standard in *Meritor* is best understood on functional grounds: Employers can best prevent sexual harassment by their agents by putting in place procedures designed to encourage victims of harassment to report misconduct. An actual notice standard that is not conditioned on the availability of procedures will have the predictable but perverse effect of *discouraging* employers from establishing procedures that will put them on notice of their agents' misconduct.

Yet the defense that the Court ruled unacceptable for sexual harassment of adults in the workplace is precisely the actual notice standard adopted by the Fifth Circuit for the sexual harassment of schoolchildren under Title IX. Under the Fifth Circuit standard, as applied in this case:

> [S]chool districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board

> with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Doe v. Lago Vista Independent School District, 106 F.3d 1223, 1226 (5th Cir. 1997), Pet. App. at 15a.

This is the third in a line of cases in which the Fifth Circuit has determined that only actual knowledge, followed by a failure to act, on the part of supervisory personnel with direct authority over the offending teacher will result in district liability; knowledge on the part of "the bulk of employees, such as fellow teachers, coaches, and janitors," is irrelevant "unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse." *Rosa H.*, 106 F.3d at 660 (5th Cir. 1997). *See also Canutillo Ind. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2434 (1997).

The stringency of the Fifth Circuit's rule is illustrated by the facts in *Leija*, in which the plaintiff, a second grader, complained to her homeroom teacher that a coach was behaving inappropriately toward her; another girl made the same complaint to the same teacher. The teacher did nothing, and reported the complaints to no one, even after the plaintiff's parents also spoke to her about it. Despite evidence that the school district, through publications distributed to students and their parents, specifically instructed that any complaints be routed through students' homeroom teachers, the Fifth Circuit held that the homeroom teacher's knowledge could not be imputed to the school district and that the school district was not liable to the student as a matter of law.

The Fifth Circuit's actual notice standard under Title IX creates all the wrong incentives for school districts, much as it would for

employers under Title VII.[16] If a school district can be liable for only that sexual harassment of which it has actual notice through a managerial official, it is irrational for the district to establish procedures by which it can gain actual notice of misconduct. The sensible course for the liability-conscious school district is to "see-no-evil" and maintain its defense of ignorance against any eventual lawsuit. It is hard to imagine a legal standard that would more completely undermine Title IX.

Nothing in the text, structure, or purpose of Title IX justifies the imposition of a less demanding standard of school district responsibility than the standard of employer liability under Title VII. On the contrary, as we have shown, the distinct features and context of Title IX support broader school district responsibility and liability for the conduct, in particular, of teachers and others granted authority over minor schoolchildren.

It seems beyond cavil that teachers have *at least* the power over their students that supervisors have over employees and that school districts bear *at least* the level of responsibility toward minor students that employers bear toward their employees. As the Second Circuit observed in *Kracunas v. Iona College*, 119 F.3d 80 (2d Cir. 1997), "College students should not receive less protection

---

16. It is striking to compare this "actual notice" test for Title IX to the Fifth Circuit's own Title VII caselaw. In *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 106 U.S. 1065 (1987), the Fifth Circuit held that an employer would be liable for a supervisor's sexual harassment of an employee if the employer *knew or should have known* that the harassment was occurring and failed to take adequate remedial measures. *See also Farapella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992). Thus, it is only in the Title IX context that proof of actual knowledge is required of victims of sexual discrimination, despite the obviously greater vulnerability of students to sexual harassment and despite their comparatively inferior power to utilize a complaint system, even if one is in place.

from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace." *Id.* at 88. No lesser obligation should be imposed in the case of sexual harassment of minor schoolchildren.

III.

A SCHOOL DISTRICT SHOULD BE LIABLE FOR A TEACHER'S HARASSMENT, WHETHER OR NOT THE SCHOOL DISTRICT HAD NOTICE OF IT, IF THE DISTRICT HAD NOT ADOPTED AND PUBLICIZED ADEQUATE GRIEVANCE PROCEDURES.

At a minimum, the Court should hold districts liable for sexual harassment of which they knew or should have known. But a school district should not be able to claim lack of knowledge, actual or constructive, if it did not have in place reasonable avenues of complaint and redress, as required under longstanding federal regulations. Paraphrasing the Court in *Meritor*, the school district's claim that its lack of knowledge of harassment "should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." 477 U.S. at 73.

A. School Districts have a clearly established legal obligation to maintain and publicize adequate policies and grievance procedures to prevent and curtail harassment.

Long before this case arose, the Department of Education issued a set of implementing regulations. 45 Fed. Reg. 30955 (1980), *codified at* 34 C.F.R. § 106 (1997).[17] These regulations required a school district receiving federal funds: (1) to "designate

17. These regulations were promulgated in 1980 when the Department of Education assumed enforcement of Title IX from the Department of Health, Education, and Welfare.

at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this [regulation]," and to "notify *all* its students and employees of the name, office, address and telephone number" of that employee, 34 C.F.R. § 106.8; (2) to "adopt *and publish* grievance procedures providing for prompt and equitable resolution of student and employee complaints" of discrimination, *id.* (emphasis added); and (3) to notify students, among others, of its policies and protections against discrimination. 34 C.F.R. § 106.9.

The existence of well-publicized grievance procedures is crucial. As the Office of Civil Rights [hereinafter "OCR"] recently explained,

> By having a strong policy against sex discrimination and accessible, effective and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. 12034, 12040 (1997). It is through these procedures that educational institutions can best carry out their obligations under Title IX to prevent discrimination.

Yet Respondent made no attempt to comply with these requirements. Certainly there was no compliance with the requirement that all affected persons be notified of the existence of a grievance process, for Superintendent Collier could not identify a single attempt to notify any students that such a procedure existed, J.A. 72a-73a, if indeed it actually did exist, and Gebser testified without contradiction that she was never informed of any procedure she could have used to report her teacher's inappropriate comments or conduct. J.A. 63a-65a.

B. A School District that fails to maintain and publicize adequate procedures for dealing with sexual harassment should be liable for harassment regardless of its lack of notice.

The failure to comply with OCR's longstanding procedural requirements should render the school district liable for harassment that might otherwise have been prevented or discovered and curtailed. As OCR explained in issuing its Guidelines:

> [I]n the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and failed to remedy it. This is because, without a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied. Moreover, . . . a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.

62 Fed. Reg. at 12040 (footnotes omitted). Under this standard, a school district is liable for harassment of which it knew or should have known, *or for which it affords no reasonable avenue for complaint and redress.*[18] In effect, the school's ability to

18. *See Krakunas*, 119 F.3d at 87-88 (adopting this standard as well as the standard derived from RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)(1958)). This standard has also been applied, following *Meritor*, under Title VII, as part of either a "constructive notice" or an "apparent authority" inquiry. In other words, employers may be (Cont'd)

defend against liability for harassment on the basis of its lack of notice, constructive or actual, is conditioned on the existence of adequate procedures for complaining of and responding to harassment.

As the above passage indicates, the OCR standard is supported by agency principles under which a principal is liable for acts committed by the agent with the "apparent authority" of the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). From the perspective of a young adolescent, it is not unreasonable to conclude that, in the absence of any information from the school district defining and condemning sexual harassment, and any direction as to how to complain of sexual harassment, the sexual approaches of a respected teacher with educational and disciplinary authority over the student may be cloaked with "apparent authority," or at least acquiescence, of the school.[19]

(Cont'd)
held to have constructive notice of harassment, or to have created "apparent authority" to engage in harassment, in the absence of adequate grievance procedures and proper publication of the employer's policy and availability of those procedures. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 634 (2d Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 563 (1997) (employer held liable for harassment perpetrated by supervisor if "the employer provided no reasonable avenue for complaint"); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1450 (10th Cir. 1997), *pet. for cert. filed*, No. 97-232 (looking to established procedure as element of determining liability: "the question of whether the employer established and implemented a policy against sexual harassment is an important factor in deciding whether apparent authority [for supervisor harassment] existed").

19. This has been recognized as well in the employment context. The EEOC's Policy Guidance on Current Issues of Sexual Harassment explains,

> [I]in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual

(Cont'd)

But more important than agency principles here is the functional importance of requiring adequate procedures as a condition for a school district's defending on the basis of lack of notice. We have shown that an "actual notice" standard discourages school districts from establishing effective grievance procedures. A school district should not be able, as it is under the Fifth Circuit's narrow construction of Title IX, to insulate itself from liability by insulating itself from knowledge of its own teachers' wrongdoing. But a simple "knew or should have known" standard may create similar incentives. If the question is simply whether school officials had adequate "clues" that harassment may be taking place, the school district may still decide that it is better to do nothing; a grievance procedure may simply bring more clues to its attention.[20]

(Cont'd)

> harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.

EEOC COMPL. MAN. (CCH) ¶ 3114, 3280 (Mar. 19, 1990). These EEOC guidelines are particularly significant because the OCR has long taken the position that EEOC standards of employer liability under Title VII should apply to school districts under Title IX as well. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Serv., OCR, to Regional Civil Rights Directors (Aug. 31, 1981)).

20. Moreover, a constructive notice standard without the procedural proviso advocated here might permit a district that has no adequate procedures to argue that it would not have known of harassment even *with* adequate procedures because the victim would not have used procedures if they had been in place. This hypothetical inquiry clearly has no place in assessing the liability of a school district that has blatantly failed to comply with the procedural requirements that have long been imposed as a condition of receiving federal funds.

It is fully consistent with the text and purpose of Title IX to impose liability, on behalf of a student who has been "subjected to discrimination" under a school district's programs, on the basis of the school district's failure to institute adequate procedures for preventing and uncovering sexual harassment under its programs.

Moreover, under no principle of statutory construction may a school district accept federal monies with specific requirements for internal procedures and notification of students, and then simply disregard those requirements while continuing to receive the underlying grants. This is no more than a simple contractual requirement that the conditions of the grant be complied with. When an individual is subjected to discrimination under a program that has failed to comply with these straightforward and clearly established procedural conditions, and harm results, the school district should be held liable.[21]

---

21. A school district that has failed to comply with these long-established and clearly-applicable procedural requirements has acted "intentionally" within the meaning of Spending Clause requirements; those requirements would thus be met here even if *Franklin* did not clearly establish that the intentional actions of the teacher perpetrator fulfilled the requirement of intentional discrimination for liability under Spending Clause legislation, *see supra* n.15. Liability based on the failure to comply with these clearly established legal requirements is not based on mere negligence, as the Seventh Circuit in *Smith* characterized the imposition of liability under a "knew or should have known" standard. *Smith*, 128 F.3d at 1028-29.

IV.

SCHOOL DISTRICTS SHOULD BE LIABLE UNDER TITLE IX FOR SEXUAL HARASSMENT BY A TEACHER WHO IS AIDED IN CARRYING OUT THE HARASSMENT BY HIS OR HER POSITION OF AUTHORITY OVER THE STUDENT/VICTIM.

Title IX does not contain the "agency" language on which the Court relied in *Meritor* to reject vicarious liability for all supervisory harassment. 477 U.S. at 72.[22] But that cannot mean that school districts are responsible for *no* acts of individual agents, for school districts can act at all only through individuals.[23] On the contrary, the language of Title IX, as well as the unique context in which it operates, support a broad conception of school district responsibility for discrimination under its educational programs. But it is also unlikely that Congress intended to make school districts vicariously liable for all acts of discrimination or harassment by any of its

---

22. *Franklin* implies — though the issue of vicarious liability was admittedly not presented — that schools are directly accountable for intentional discrimination by teachers, in that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe," that is, a teacher's sexual harassment and abuse of a student. 503 U.S. at 75.

23. There is thus a certain disingenuousness in the decisions, like *Rosa H.* and *Smith*, that have adopted an "actual notice" standard because of the purported inapplicability of agency principles. For they still must answer the question, "actual notice to whom?" And they must still identify some class of school district agents whose knowledge and subsequent inaction are relevent. Those decisions rest essentially not on a rejection of liability for the acts of "agents" but on an extremely restricted conception of which agents' knowledge and acts will be deemed acts of the school district. *See, e.g., Rosa H.*, 106 F.3d at 659. That conception is inconsistent with both the language and the purposes of Title IX.

employees or students. We agree that some limiting principles are called for.

A number of courts have adapted from Title VII caselaw the "known or should have known" standard of liability, often called "constructive notice."[24] At a minimum, it is certainly appropriate to hold school districts liable for discriminatory harassment of which their managing agents knew or should have known. But this standard, even with the procedural proviso proposed above in Part III, is not necessarily adequate to address the problem of teachers who abuse their authority over students to lure them into sexual activity. Like Waldrop, the teacher will nearly always endeavor to keep the illicit activity secret, and to induce the student to maintain the secrecy.

As between the school district that put the teacher in the position of extracting sexual gratification through abuse of his authority and the student who is thus abused, the school district should bear the cost of this abuse, and should be given the greatest encouragement to devise ways to prevent and curtail harassment by screening and training employees and by uncovering misconduct at an early stage through adequate grievance procedures.

Particularly in the context of sexual predation against elementary and secondary school students, the standard of school district liability should directly address the problem of abuse of authority.

---

24. *See, e.g., Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), *petition for cert. pending*, No. 97-906 (applying this standard to co-worker harassment); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (same). Following the Court's pointed statements in *Meritor*, 477 U.S. at 73, what employers "should have known" depends in part on whether they maintained adequate procedures for encouraging victims of harassment to come forward with complaints. *See supra* n.18.

A. Well-established principles of agency law support holding school districts vicariously liable for sexual harassment by teachers where the teacher was aided in carrying out the harassment by his position of authority in the institution.

Under agency principles, the principal is liable for torts committed by its agent outside the scope of employment (as is invariably the case with sexual harassment) where the agent "was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1958). As adapted by the Department of Education to the context of sexual harassment, the school district should be liable for teacher harassment where the teacher "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. at 12039 (1997).[25]

A number of courts have turned to § 219(2)(d) as a basis for liability under Title IX for sexual abuse by teachers. This was the basis of the holding of the Second Circuit in *Kracunas*:

> [I]f a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct.

119 F.3d at 88. *See also Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426-27 (N.D. Cal. 1996); *Hastings v. Hancock*, 842 F. Supp. 1315, 1319-20 (D. Kan. 1993).

---

25. We argue below that the Department of Education's interpretation of the statute is itself entitled to some deference.

While Title IX does not direct courts to look to principles of agency law, it certainly does not foreclose reference to agency principles that are fully consistent with the language and purposes of Title IX. The imposition of vicarious liability for teacher harassment is thus not *based* upon agency law, even in the limited sense in which employer liability under Title VII is based upon agency law under *Meritor*.[26] Vicarious liability is based upon the distinct language and purposes of Title IX. But the agency principle embodied in § 219(2)(d) helps to define the scope of vicarious liability in a way that is consistent with Title IX's language and purpose.

Thus, for example, this application of agency principles would recognize an appropriate distinction between the acts of teachers, coaches, administrators, and others who exercise authority over students, on the one hand, and the acts of custodial or clerical workers and of students, who do not normally exercise such authority, on the other hand.[27] The former are normally "aided in carrying out the sexual harassment" by their position of authority; the latter are normally not.[28] Harassment by the former, where it is

---

26. The Court in *Meritor* "agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area," but recognized that "such common law principles may not be transferable in all their particulars to Title VII." 477 U.S. at 72.

27. As an example of the latter type of case, *see Mary M. v. North Lawrence Community Sch. Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997), in which a 21-year-old cafeteria worker harassed a 13-year-old student over whom he had no authority. The conduct in that case, unlike in this case, could not be presumed to have arisen "under any educational program or activity" absent further inquiry into the knowledge and actions or inaction of the school district.

28. We do not dispute the suggestion of OCR that, for young

(Cont'd)

facilitated by their authority over students, is fairly regarded as "discrimination . . . under the educational program," and should give rise to liability. School district liability for harassment by the latter would depend on further inquiry into the knowledge and action or inaction of more responsible school officials.

In this case, there is little doubt that Waldrop was "aided in carrying out the sexual harassment" by his position of authority. Waldrop's careful cultivation of a relationship with Gebser could only have occurred because he was her trusted teacher and mentor, positions of power that he gained from Respondent. His continued contact with her in that role, beginning when she was in middle school and continuing over the following two years, allowed him steadily to escalate his psychological manipulation until it culminated in sexual contact and intercourse. His pretextual visit to her house occurred in the guise of carrying out his teaching duties. His unmonitored one-on-one relationship with her over the following summer, under the cloak of a summer school course for one, created the opportunity for regular sexual contact. If it were not for the trust engendered by the student-teacher relationship, Gebser would in all likelihood have recognized the inappropriateness of his early comments, prior to their escalation to illicit sexual activity. As it was, however, he was the person within the school district she most relied on, and she wanted him to continue as her teacher and mentor, so she did not resist him even after she recognized that his actions were wrong.

(Cont'd)
elementary school students, any adult working at the school may appear to act with the authority of the school. SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. 12039 (1997). Whether an employee was "aided in carrying out the sexual harassment . . . by his or her position of authority" or acted with "apparent authority" are factual questions, the answers to which will depend on a variety of circumstances, including the age and maturity of the victim.

B. It is consistent with the longstanding position of the Department of Education to hold school districts liable for harassment by teachers who were "aided in carrying out the harassment of students by his or her position of authority."

As noted above, the Department of Education's Office of Civil Rights has concluded that a school district is liable for harassment by its employee, among other circumstances, if the employee "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Department of Education, Office of Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12039 (1997).[29] The OCR's interpretation of the scope of school district liability for sexual harassment is a refinement of the position taken by the agency since 1981, when OCR declared that EEOC standards of employer liability under Title VII were applicable to educational institutions under Title IX as well.[30] The EEOC has long taken the position that employers are broadly liable

---

29. The Department of Education is the agency with responsibility for administering Title IX. That agency and its predecessor, the Department of Health, Education, and Welfare, were charged with interpreting and implementing the rights protected by Title IX. 20 U.S.C. § 1682 (1994). *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522, n.12; *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1996). By contrast, Title VII does not give to the EEOC comparable powers of interpretation and implementation. *See Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (noting limited authority of EEOC to promulgate rules and regulations under Title VII).

30. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Serv., OCR, to Regional Civil Rights Directors (Aug. 31, 1981)).

for harassment by supervisors who were aided in carrying out the harassment by their supervisory authority.[31]

The Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See also Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006, 1015 n.20 (5th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 165 (1996) ("When interpreting Title IX we accord the OCR's interpretations appreciable deference.")[32] Moreover, as we have explained, the OCR's interpretation of Title IX and the scope of school district liability, and particularly its imposition of liability for the acts of those who are aided in carrying out harassment by the authority granted over students, is reasonable and fully consistent with the language and the purpose of the statute.

---

31. At the time of *Meritor*, the EEOC's regulations provided for employer liability for all acts of its agents. 29 C.F.R. § 1604.11(c) (1985) (cited in *Meritor*, 477 U.S. at 71). Subsequently the EEOC issued its own *Policy Guidance on Current Issues of Sexual Harassment* adopting agency principles and recognizing that "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer." EEOC COMPL. MAN. (CCH) ¶ 3114, 3280 (Mar. 19, 1990).

32. The Fifth Circuit in *Rosa H.* refused to defer to the 1997 OCR Guidance on the ground that application of the policy to cases arising before 1997 would be "retroactive." 106 F.3d at 658. But this characterization fails to reckon with OCR's longstanding interpretation of the statute as calling for the application of principles of agency and vicarious liability in determining the liability of school districts for the acts of agents. *See supra* pp. 38-39.

CONCLUSION

For the reasons set forth above, Petitioners urge the Court to reverse the decision of the Fifth Circuit.

Respectfully submitted,

TERRY L. WELDON
Counsel of Record
98 San Jacinto Boulevard
1260 San Jacinto Center
Austin, Texas 78701
(512) 477-2256

CYNTHIA L. ESTLUND
SAMUEL ISSACHAROFF
727 East Dean Keeton Street
Austin, Texas 78705
(512) 471-0347

Attorneys for Petitioners